

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 14, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal Nos. 2014AP84
2014AP941**

**Cir. Ct. Nos. 2012CV718
2012CV1213**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

DALE A. WEIS LIVING TRUST,

PLAINTIFF-RESPONDENT,

V.

MANN BROS., INC. AND DAVID L. MANN, INDIVIDUALLY,

DEFENDANTS-APPELLANTS.

TIM HUNN AND CAROL HUNN,

PLAINTIFFS-RESPONDENTS,

V.

MANN BROS., INC. AND DAVID L. MANN, INDIVIDUALLY,

DEFENDANTS-APPELLANTS.

APPEALS from orders of the circuit court for Waukesha County:
LEE S. DREYFUS, JR., Judge. *Affirmed.*

Before Neubauer, P.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. Mann Bros., Inc. and David Mann (Mann) appeal from orders awarding treble damages to Dale A. Weis Living Trust (Weis) and Tim and Carol Hunn (Hunn) on their theft by contractor claims and denying Mann's motion for relief. Mann argues that the circuit court erred in awarding summary judgment to Weis and Hunn as they presented no evidence that Mann had misappropriated trust funds by paying itself or by paying other expenses when their payments were due. We disagree with Mann's interpretation of WIS. STAT. § 779.16 (2011-12)¹ and affirm.

¶2 Weis and Hunn entered into separate contracts with Mann to provide sand, fill, dirt, and other aggregate materials for use on a state highway project. Mann did not pay Weis and Hunn the full amounts for the materials required by their contracts, and Weis and Hunn filed separate lawsuits against Mann claiming breach of contract, unjust enrichment, accounts stated, and theft by contractor. Mann stipulated to judgment on the breach of contract, unjust enrichment, and accounts stated claims in the amounts of \$85,410.64 with respect to Weis and \$33,427 with respect to Hunn. Mann moved for summary judgment on the remaining theft by contractor claims, and the Weis and Hunn cases were consolidated. The court denied Mann's motion and granted summary judgment to

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Weis and Hunn, awarding them triple the amount that Mann had shorted them under their contracts.

¶3 Mann argues that the court erred as Weis and Hunn could not establish that Mann had committed theft by contractor because there was no evidence that Mann used any of the funds that it received for the highway project for expenses unrelated to that project. Mann contends that WIS. STAT. § 779.16 requires Weis and Hunn to prove that Mann used the money it received for the project “for purposes other than the Highway 26 project before paying [Weis and Hunn], or paid disproportionately if there was a deficiency.” Mann also contends that treble damages were inappropriate as Weis and Hunn had not established that Mann had the requisite intent to justify such an award. We review independently issues of statutory interpretation and whether summary judgment was appropriately granted. *Tri-Tech Corp. of Am. v. Americomp Servs., Inc.*, 2002 WI 88, ¶19, 254 Wis. 2d 418, 646 N.W.2d 822.

¶4 An award of treble damages for a claim of theft by contractor requires proof that a contractor “knowingly retained possession of or used contractor trust funds without the owner’s consent, contrary to [the contractor’s] authority, and with the intent to convert such funds for [the contractor’s] own use or the use of another.” *Id.*, ¶2. A contractor’s refusal to pay a claim to one entitled to be paid from the contractor trust fund is prima facie evidence of the contractor’s intent to convert the funds to the contractor’s own use. *Id.*, ¶28. “A misappropriation by a contractor or subcontractor constituting a theft is not essential or a condition precedent to recovery” under the theft by contractor statute. *Armco Steel Corp. v. Hoppe*, 30 Wis. 2d 215, 218, 140 N.W.2d 255 (1966). “A claimant need not ... establish that the prime contractor has used the

money it received for a purpose other than to pay claimant.” *Loehrke v. Wanta Builders, Inc.*, 151 Wis. 2d 695, 704, 445 N.W.2d 717 (Ct. App. 1989).

¶5 The evidence before the court showed that Mann was a contractor covered by the statute, that it received funds for the improvement of lands in connection with the state highway project that it should have held in trust, and that it did not pay Weis and Hunn the full amount due for the materials they provided for that project when they were due payment. As such, Weis and Hunn established a prima facie case of theft by contractor, including the element of intent necessary for a finding of treble damages. *Tri-Tech Corp.*, 254 Wis. 2d 418, ¶2 (elements of criminal theft by contractor include specific criminal intent).

¶6 If there was a deficiency in available funds, as Mann claims, then it was on Mann to show that it paid out the trust funds on a proportional basis. Mann did not do so. We reject Mann’s convoluted attempt to argue that, to establish proportionality, it need only show that it paid Weis and Hunn in proportion to what it paid itself between the time period of August 2011, when it made its last payments to Weis and Hunn, and January 2012, when its next payments to Weis and Hunn were due, or that Weis and Hunn were paid proportionally (i.e., nothing) from the exhausted trust fund when their final payments were due. WISCONSIN STAT. § 779.16 provides a defense for contractors that experience a deficiency in funding for a public improvement project if the contractor has made proportional payments from the project funds that it has held in trust. A contractor may escape liability only if it can prove it has paid “*all* claims ... proportionally,” *see id.* (emphasis added), not just *some* claims. Mann did not prove that it had distributed project funds between itself, its

subcontractors, and Weis and Hunn on a proportional basis. The court properly found Mann liable for treble damages for theft by contractor.

¶7 Mann also contests the amount that the circuit court awarded in damages to Weis and Hunn on their theft by contractor claims. The court tripled the amount of the awards that Mann already had stipulated to in settling the contract-related claims to arrive at a \$256,231.92 award to Weis and \$100,281 to Hunn. Mann argues that the damages should have been calculated based on the proportional payments that Weis and Hunn were due, but did not receive, from the deficient trust fund proceeds.² We disagree. The proportional payment provision of WIS. STAT. § 779.16 provides a defense against liability for theft by contractor, not the remedy once a contractor is found to have violated the law. The court correctly based its calculation of damages upon the amount due to Weis and Hunn under their contracts for the materials that they provided for the Highway 26 project and for which Mann did not pay from the trust fund.

¶8 We also reject Mann’s challenge to the court’s denial of its motion for relief from the judgment, predicated on Mann’s “surprise[] by the scope of the court’s judgment.” Mann utilized its WIS. STAT. § 806.07 motion essentially to have the court reconsider its summary judgment decision and interpretation of the law. As the circuit court properly awarded summary judgment to Weis and Hunn, we likewise find that the court “examined the relevant facts, applied a proper

² We note that Mann’s argument that WIS. STAT. § 779.16 requires the court to determine damages based on what Weis and Hunn should have received proportional to Mann’s employees and other subcontractors on the project is inconsistent with its argument that § 779.16 requires proportional payments relative to Mann alone or that Mann made any such proportional payments under the statute when it paid Weis and Hunn nothing after August 2011.

standard of law, and reached a reasonable conclusion” in rejecting Mann’s § 806.07 motion. *See Dustardy H. v. Bethany H.*, 2011 WI App 2, ¶14, 331 Wis. 2d 158, 794 N.W.2d 230 (2010).

By the Court.—Orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

